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No. 86-163

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CHARLES BRIGGINS,

Petitioner,

-against-

THE POLICE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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October 3, 1986

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QUESTIONS PRESENTED

1. Whether a police officer, dismissed pursuant to Public Officers Law, §30, upon his conviction of a felony, is entitled to a reinstatement hearing if the felony conviction is overturned on appeal?

2. Whether a police officer has been afforded due process sufficient to terminate his property interest in his public employment where his employment is terminated after a jury has found him guilty of a felony in a criminal trial?

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STATEMENT OF THE CASE

Petitioner seeks to have this Court review by writ of certiorari an order of the New York State Court of Appeals, entered on May 6, 1986, which affirmed an order of the New York Supreme Court, Appellate Division, First Department, entered August

8, 1985. That order reversed a judgment of the New York Supreme Court, New York County, entered December 12, 1983, which granted a petition, brought pursuant to CPLR Article 78 to the extent that it ordered a hearing on the question of petitioner's reinstatement as a police officer. Petitioner argued, inter alia, that Public Officers Law, §30, which requires a vacatur of office upon its holder's conviction of a felony, is unconstitutional as applied to petitioner since his conviction was reversed on appeal.

Respondents rely on the facts presented in the Petition for a Writ of Certiorari and in the opinion of the Court of Appeals (Briggins v. McGuire, 67 NY2d 965, 494 NE2d 90, 502 NYS2d 985 [1986]) with the following additions. Petitioner's application for reinstatement upon reversal of conviction was reviewed by the Police Department and an extensive report, based mainly upon

testimony at petitioner's criminal trial, was submitted by the Advocate's Office of the Police Department to the Commissioner for his consideration. Based upon his findings, the Advocate's Office recommended against reinstatement and the Commissioner acted in accordance with this recommendation.

Among other findings based upon testimony at the criminal trial, the following are most significant:

> "Mr. William Windsor's apartment in the 1st Precinct in New York City was burglarized on September 2nd 1974. Among the items missing was his check book containing checks numbered from approximately 126 to 150. These checks, along with some other stolen property, were recovered by the 1st Precinct Detective Unit on September 3rd 1974. This is the same Detective Unit to which the applicant was assigned. When Briggins was arrested on March 1, 1975, 6 months later, he was in possession of several of these checks, specifically numbers 137, 138, 143 and 144 which were made payable to the order of Garry Morris and signed either W. Windsor or William Windsor. These

checks had the amounts printed on them by means of a check writing machine.

He was also in possession of William Windsor checks numbered 139, 140 and 141 which were not payable to anyone's order, but did have amounts preprinted on these checks by means of a check writing machine. All of the checks were stamped by one of two check writing machines, or one machine with interchangeable stamping plates. One stamp reads 'BONDED 8D51249' the other reads 'INSURED 87083146.'

Briggins' explanation regarding his possession of these checks is that he found them by the curb in the vicinity of the 1st Precinct where he worked in 1975.

He claims they were blank when he found them; that he just tossed them into the trunk of his car and forgot about them; and that he found them only about three weeks prior to his arrest or approximately February 7, 1975. This is five and a half months after being recovered by the New York Police Department. Mr. Briggins implied throughout his criminal trial and in his legal memorandum that the Suffolk County Police 'framed' him by writing his assumed name, 'Garry Morris', on the blank Windsor checks.

> However, another check from this same book surfaced. Check #132 made payable to the order of 'Samuel Butter' or 'Samuel Butler.' This check also had the amount stamped on it by a check writing machine bearing the same INSURED #87083146. The date on this check is January 14, 1975, a month and a half prior to Briggins arrest by Suffolk County Police, thereby eliminating any likelihood of fabrication by the police. This check was cashed at a Waldbaum's Super Market, store, #31, in Carle Place approximately 8 miles from Briggins hometown of Freeport.
>
> The manager of Waldbaums, Mr. Vincent Margo, testified at the criminal trial that he authorized the cashing of check #132; and he identified Charles Briggins as Samuel Butler. Check #132 was dishonored because of insufficient funds on January 17, 1975, resubmitted, and again dishonored on January 20, 1975."

Based upon this information culled from petitioner's criminal trial, the Advocate's Office recommended that petitioner not be afforded a hearing and that his application be denied.

Reasons for Denying a Writ of Certiorari

ARGUMENT

UPON HIS CONVICTION OF A FELONY, REGARDLESS OF ANY SUBSEQUENT REVERSAL, PETITIONER'S PUBLIC OFFICE WAS AUTOMATICALLY VACATED BY OPERATION OF STATE LAW AND HE CEASED TO POSSESS A PROPERTY INTEREST COGNIZABLE UNDER THE FOURTEENTH AMENDMENT. PETITIONER'S CRIMINAL TRIAL AFFORDED HIM ALL THE DUE PROCESS TO WHICH HE IS REASONABLY ENTITLED PRIOR TO DEPRIVATION OF HIS PROPERTY INTEREST. THE FACT THAT PETITIONER'S CONVICTION WAS LATER REVERSED DOES NOT REVIVE HIS PROPERTY INTEREST, ONCE VALIDLY EXTINGUISHED.

(1)

In order to establish a property interest sufficient to warrant due process protection, petitioner must demonstrate a legitimate claim of entitlement to continued tenure or reinstatement which arises from state law or from existing rules or mutual understandings steming from the law.

Bishop v. Wood, 426 US 341, 343-347 (1976); Board of Regents v. Roth, 408 US 564, 577 (1972); Perry v. Sindermann, 408 US 593, 601 (1972); Greene v. McGuire, 683 F2d 32 (2nd Cir., 1983); Baden v. Koch, 638 F2d 486, 489 (2nd Cir., 1980); Quinn v. Syracuse Model Neighborhood Corp., 613 F2d 438, 447 (2nd Cir., 1980). Since a public officer holds office subject to the terms and conditions imposed by the statute creating and regulating his office (Gordon v. Leatherman, 450 F2d 562, 565 [5th Cir., 1971]), an examination of the law of New York State with respect to the right of a police officer to retain his position following his felony conviction must be made in order to determine whether plaintiffs possess a property interest protected by the Fourteenth Amendment.

The Administrative Code of the City of New York, §434a-14.0, provides that the

Police Commissioner shall have the power to remove for misconduct, upon written charges and a hearing, officers who have completed a probationary period. However, that section must be read in connection with Public Officers Law, §30, which is entitled "Creation of vacancies" and which provides for vacatur of public office upon the happening of certain specified events. Specifically, subdivision 1(e) of §30 states that a public office shall be vacant upon the incumbent's:

> conviction of a felony, or a crime involving a violation of his oath of office."

Police Officers have been held to be public officers for the purposes of the Public Officers Law. Canteline v. McClellan, 282 NY 166, 170, 25 NE2d 972 (1940); Matter of Hodgson v. McGuire, 75 AD2d 763, 427 NYS2d 820 (1st Dept., 1980); Fishbein

v. State, 282 App. Div. 600, 125 NYS2d 845 (3rd Dept., 1953).

The New York courts have construed section 30 as operating to vacate an office simultaneously and automatically upon the conviction of the incumbent. No hearing need be held or other action taken as a prerequisite to vacatur. Matter of Hodgson v. McGuire, supra; Matter of Smith v. Noeppel, 204 Misc 49, 50-52, 120 NYS2d 466 (Sup. Ct. Erie Co., 1953). Public Officers Law, §30, was not intended as punishment for wrongful conduct. Rather, it is simply an automatic limitation on an incumbent's term of office. Matter of Toro v. Malcolm, 44 NY2d 146, 149-150, 375 NE2d 739, 404 NYS2d 558 (1978), cert. den., 439 US 837 (1978); Matter of Obergfell, supra, 239 NY 48, 145 NE 323 (1924); Sroka v. Municipal Civil Service Commission of the City of

Buffalo, 57 AD2d 1064, 395 NYS2d 854 (4th Dept., 1977).

The State courts have considered whether the operation of section 30 is affected by the pendancy of an appeal from a conviction or its subsequent reversal. In Matter of Obergfell, supra, the Court of Appeals held that vacatur of office upon conviction of a felony was not defeated by the possibility that the conviction may be reversed on appeal. Subsequently, in 1953, the State Supreme Court was called upon to decide whether the reversal of a conviction upon appeal entitled the officer to reinstatement. In Smith v. Noeppel, supra, 204 Misc 49, a police officer's conviction for bribery, conspiracy and the taking of unlawful fees was reversed by the Appellate Division and the indictment dismissed. The Court denied the officer's petition for reinstatement, holding that the order of the

Appellate Division cleared the individual of the accusation but did not defeat the application of section 30. The Court noted that a public office should not remain vacant during any period when the former occupant "winds his way through the labyrinth of motions, appeals, new trials and possibly more motions and more appeals." 204 Misc at 52. See also, Matter of Pauley v. Noeppel, 1 Misc 2d 928, 120 NYS2d 472 (Sup. Ct. Erie Co., 1953); Matter of Tourjie v. Noeppel, 120 NYS2d 478 (Sup. Ct. Erie Co., 1953).

In Sroka v. Municipal Civil Service Commission, supra, 57 AD2d 1064, the Appellate Division, Third Department, held that the reversal of a conviction of a police officer and the consequent dismissal of his indictment did not entitle him to reinstatement.

This issue was considered by the Court of Appeals in 1978 in Matter of Toro v.

Malcolm, supra, 44 NY2d 146. The Court noted that the continued efficient performance of government functions requires that an office be filled upon the conviction of its incumbent without concern for the possibility that at some future date the former incumbent's conviction may be reversed. 44 NY2d at 150. It stated that the reversal of a conviction is often not indicative of innocence but may be the result of a technicality or prosecutorial error which results in a guilty person going unpunished. Moreover, the Court observed that the balance between an officer unjustly convicted of a felony and the public's right to place confidence and trust in public officers must be struck in favor of the public. The Court concluded that reinstatement following reversal of a conviction rests solely in the discretion of the government agency in which the officer was employed. 44 NY2d at 152.

The Court reaffirmed this decision in Matter of Gunning v. Codd, 49 NY2d 495, 499, 403 NE2d 1208, 427 NYS2d 209 (1980), and in the instant case.

This analysis of Public Officers Law, §30, and the cases construing it clearly and conclusively demonstrates that petitioner has no right under New York law to reinstatement following the reversal of his conviction or a hearing on the question of reinstatement. Moreover, petitioner does not allege that it is Police Department policy to reinstate a former officer whose conviction has been reversed on appeal. Thus, a police officer assumes his position on condition and with the understanding that he will be automatically dismissed from the force without a hearing if he is convicted of a felony or other crime involving a violation of his oath of office and will not be entitled to reinstatement if his conviction is

subsequently reversed on appeal. The Court of Appeals has specifically held that the property interest of an officer to continued tenure is extinguished upon his conviction of a felony. Economico v. Village of Pelham, 50 NY2d 120, 126, 405 NE2d 694, 428 NYS2d 213 (1980).

Since plaintiffs have failed to demonstrate a legitimate claim of entitlement under state law or any rule or mutual understanding providing for reinstatement, they possess no property right which would entitle them to a hearing on that question.

(2)

The United States Court of Appeals for the Second Circuit has addressed the issue of Fourteenth Amendment due process rights in regard to Public Officers Law, §30, in Greene v. McGuire, supra, 683 F2d 32. There, as here, the plaintiffs, former police officers, sought a hearing on their

applications for reinstatement. The officers' convictions had been reversed for insufficient evidence. 683 F2d at 33, 36. The Court held that no hearing was required and that the statute worked no deprivation of either property or liberty interests protected by the Fourteenth Amendment. Addressing the claim of a right to a hearing based on an alleged property interest, the same claim made at bar, the Court stated (683 F2d at 35):

> "Once they were convicted ... they lost their property interest.
>
> * * *
>
> The statute and its interpretations are plain: the plaintiffs' jobs are no more. When plaintiffs applied for reinstatement, they had neither the right to return nor any reasonable expectation of being rehired. Because state law left them nothing, Commissioner McGuire's decision deprived them of nothing. His decision did not implicate due process."

Petitioner is not entitled to procedural due process which guarantees that, in every case, the result will be absolutely correct. No system is foolproof. He is entitled to a procedure reasonably calculated to assure that his rights are protected. Clearly, a criminal trial with its full panoply of procedural and substantive protections is more than sufficient to afford petitioner the minimal due process rights required under the Constitution before he is deprived of a property interest.

Public Officers Law, §30, serves the dual purpose of ridding government service of convicted felons and of insuring the efficient functioning of government by permitting government to fill vacant offices rather than keeping them open until completion of the entire lengthy criminal appeal process. See, Matter of Toro v.

Malcolm, supra, 44 NY2d 146; Matter of Obergfell, supra, 239 NY 48.

Since petitioner has been afforded significant due process prior to his termination by operation of section 30 and since the statute serves to further important government interests, petitioner has suffered no deprivation of his due process rights.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

October 3, 1986

Respectfully submitted,

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